IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-1827

ALAN HAIM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alan Haim prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered May 24, 1977 which affirmed the judgment of the United States District Court for the Western District of Louisiana.

OPINIONS BELOW

Neither the judgment of December 17, 1976 by the United States District Court for the Western District of Louisiana (Honorable Ben C. Dawkins, Jr., Senior Judge) revoking probation nor the judgment of the United States Court of Appeals for the Fifth Circuit of May 24, 1977 affirming the judgment of the District Court was rendered in the form of an opinion. The order of the Fifth Circuit filed May 24, 1977 merely states, "Affirmed;" a copy of the per curiam summary affirmance by the Fifth Circuit is reprinted in Appendix No. 1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered May 24, 1977. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

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1. May the United States District Court for the Western District of Louisiana find a

film, magazine, and brochure which were mailed from Los Angeles, California to Springfield, Illinois, and which never passed through the Western District of Louisiana, to be obscene without the benefit of any evidence of the community standard of Illinois or California or any state or federal judicial district through which the materials passed?

2. Can material which never enters Louisiana be found in violation of the Louisiana community standard for obscenity?

3. May the United States District Court for the Western District of Louisiana revoke petitioner's probation consistent with the First and Fifth Amendments to the United States Constitution by finding that materials sent by him from Los Angeles, California to Springfield, Illinois violated the community standards of the Western District of Louisiana? Does such a ruling violate petitioner's rights under the First and Fifth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fifth Amendment provides, in part, as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Title 18, United States Code, §1461 provides, in part, as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and --
>
> * * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . .
>
> * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned for more than ten years, or both, for each such offense thereafter.

"The term 'indecent' as used in this section includes matter of a character tending to incite arson, murder, or assassination."

STATEMENT OF THE CASE

On June 19, 1975, a six-count indictment was returned by a grand jury of the United States District Court for the Western District of Louisiana alleging that petitioner violated

Title 18, United States Code, §1461, by mailing from the Central District of California to the Western District of Louisiana certain obscene matter. Prior to his arraignment in the Western District of Louisiana, petitioner filed a motion to change venue pursuant to Rules 21(b) and 22 of the Federal Rules of Criminal Procedure. Respondent filed opposition memoranda, contending, among other things, that the case could not be transferred to the Central District of California because the community standards of the Western District of Louisiana, not the Central District of California, were the only relevant standards for the purpose of determining the obscene nature of the materials. Respondent relied on United States v. Elkins, 396 F. Supp. 314 (C.D. Cal. 1975). On August 11, 1975, the Honorable Ben C. Dawkins, Jr., Senior Judge, denied petitioner's motion for change of venue in light of U.S. v. Elkins, supra.

Petitioner challenged this ruling by seeking review in this Court, but this Court declined to grant leave to file a petition for writ of mandate and prohibition. Novick and Haim v. United States District Court, 423 U.S. 911 (1975). The United States Court of Appeals for the Fifth Circuit also declined, without opinion, to issue a writ of mandate.

Subsequently petitioner pleaded guilty on November 3, 1975, to counts 1 and 3 of the indictment. On January 30, 1976, petitioner was sentenced on his plea; specifically, petitioner was sentenced to prison for five years,

execution of confinement of sentence was suspended and petitioner was placed on five years probation on condition that he "not engage directly or indirectly in business connected in any way with the distribution of obscene or pornographic material."

On December 2, 1976, the probation officer of the United States District Court for the Western District of Louisiana filed a petition to revoke the probation of petitioner for the reason that petitioner violated the special condition of his probation by continuing to engage in the distribution and sale of pornographic material. As a result, petitioner was arrested in California and brought to Louisiana where a hearing was held on December 17, 1976. At the hearing, the probation officer who sought petitioner's revocation testified that he was in court when petitioner was initially placed on probation. The probation officer admitted that he did not give petitioner a specific legal definition of obscenity. During the probation officer's testimony, the court interrupted and stated,

> "Actually, there is no legal definition under the Supreme Court decisions. It is up to the jury to decide whether according to the standards and morals of the community in which it is distributed that the material was obscene.
>
> "You can walk down some streets in Los Angeles and San Francisco and these things are showing in movie

> houses and they get by with it. In Louisiana it is different."

Immediately after that comment by the court, petitioner's counsel asked,

> "We do apply the local community standards of the area of distribution?"

The court responded,

> "That's why he changed his plea."

The remainder of the evidence presented at the hearing revealed only that petitioner mailed allegedly obscene matter from Los Angeles (Central District of California) to Springfield, Illinois, all of which are outside the Western District of Louisiana and the Fifth Circuit Court of Appeals.

No evidence was presented with respect to whether the materials were obscene either in Illinois or California. At the conclusion of the evidentiary hearing, the court made the following comments:

> "I might add that the movie, as well as the literature, clearly is obscene. It is obscene in Louisiana where we are trying the probation revocation and that is all that is required. . . . In the first place, probation is a matter of grace on the part of the court.

"A hearing on probation revocation is not a trial. It is to bring to the court's attention whether or not the man violated the terms and conditions of probation. Whether or not California or Illinois would, as a community standard, regard this as obscene is of no moment in a hearing of this kind. In the mind of this court, it is obscene and pornographic.

"We gave him a chance by giving him a suspended sentence and he clearly understood that he was not to engage in this sort of thing anywhere ir the United States. We knew he was going back to California. He was not to engage in this activity anywhere in the United States.

"The probation is revoked. Suspension of the five year sentence which was imposed on January 30, 1976 is set aside and he is required to serve that sentence on count 1.

"As to count 2, (sic) he will be reinstated upon probation with the same conditions for the balance of the original term to begin when he is released from parole and his probation starts again."

Pursuant to the judgment of the District Court of December 17, 1976, petitioner was placed in the custody of the Attorney General

and he is now serving a five year sentence at the Federal Correctional Institution at Lompoc, California.

Petitioner filed a notice of appeal on December 17, 1976, and the United States Court of Appeals for the Fifth Circuit, after placing the matter on its summary calendar, rendered a per curiam decision without the benefit of oral argument on May 24, 1977 in which the court stated, "Affirmed." The contentions made herein were made both in the District Court and the Court of Appeals.

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Miller v. California, 413 U.S. 15 (1973), Hamling v. United States, 418 U.S. 87 (1974) and Smith v. United States, ___ U.S. ___, 45 U.S.L.W. 4495 (May 24, 1977), this Court has had the occasion to deal with the difficult and elusive concept of the community standard as it relates to obscenity. This Court has clearly indicated by these cases that obscenity is a local problem to be dealt with by local fact finders.

In Miller v. California, 413 U.S. 15 at page 32, this Court stated,

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."

This Court went on to state the converse:

> "People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." 413 U.S. at 33.

In other words, this Court has stated on the one hand that a "conservative" community should not have to tolerate materials thay may be tolerated in a more "liberal" community. Conversely, a "liberal" community should not have to have the level of its "sexually explicit materials" limited by the least tolerant community in our country.

What the District Court and the Fifth Circuit have done in the instant case is to permit a district judge for the Western District of Louisiana to impose his views as to sexually explicit material upon the communities in Springfield, Illinois and Southern California. Unless material is obscene, it is constitutionally protected. If the materials which were sent in this

case were not obscene either in Illinois or California, the District Court for the Western District of Louisiana had no authority to impose censorship on those areas of the country.

The defect in the reasoning of the District Court is its determination that materials can be deemed obscene in the abstract without reference to any geographic locality. The teachings of this Court are to the contrary, that something is obscene with reference to a particular locality. Because petitioner did not distribute the materials in the Western District of Louisiana, the materials should not have been judged by the standards of that community.

In short, the District Court imposed the wrong community standard because community standards differ from place to place; the materials sent by petitioner in the instant case could have only been judged with reference to the communities where the materials were sent or received.

This Court's heavy emphasis upon the importance of local communities in obscenity cases has made it impossible to obtain changes of venue in obscenity cases. See United States v. McManus, 535 F.2d 460 (8th Cir. 1976), cert. den. sub. nom. McManus v. United States, ___ U.S. ___, 50 L.Ed.2d 769 (1977).

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to issue a writ of certiorari in order to clarify the law of obscenity and in particular the application of the local community standard principle.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

APPENDIX No. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 76-4462
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALAN HAIM,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

(May 24, 1977)

BEFORE AINSWORTH, MORGAN AND GEE,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

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* Rule 18, 5 Cir.; See Isbell Enteriprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.